

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

**Supreme Court Case No. 15390 and 15391  
Court of Appeals Case No. 323387  
Court of Appeals Case No. 329264  
Saginaw County Probate  
Case No. 13-130558 DE**

**In Re:**

**James Erwin, Senior, Deceased**

---

**REPLY TO APPELLEE'S ANSWER TO APPELLANT'S APPLICATION  
FOR LEAVE TO APPEAL TO MICHIGAN SUPREME COURT**

**L. FALLASHA ERWIN (27018)  
Commercial Law Corporation, P.C.  
Attorney for Appellant  
220 Bagley, Suite 1010  
Detroit, MI 48226  
(313) 964-2502 (phone)  
(313) 964-2929 (fax)  
Email: [ferwin@sbcglobal.net](mailto:ferwin@sbcglobal.net)**

## TABLE OF CONTENTS

<b>TABLE OF CONTENTS.....</b>	<b>vi</b>
<b>TABLE OF AUTHORITIES.....</b>	<b>vii</b>
<b>INTRODUCTION OF REPLY .....</b>	<b>1</b>
<b>REPLY TO COUNTER STATEMENT OF FACTS AND PROCEEDINGS .....</b>	<b>1</b>
<b>A. Background Facts .....</b>	<b>1</b>
<b>RESPONSE TO REASONS TO DENY APPLICATION FOR LEAVE TO</b>	
<b>APPEALS.....</b>	<b>3</b>
<b>A. The decision is clearly erroneous and would cause material injustice under MCR 7.305(B)(5)(a) if not reviewed by the Court.....</b>	<b>3</b>
<b>B. A review under MCR 7.305(B)(3) is warranted because the ruling of the lower court is not fact based.....</b>	<b>4</b>
<b>C. A review under MCR 7.305(B)(5)(b) is warranted to resolve any conflict in Court of Appeals' decisions.....</b>	<b>4</b>
<b>ARGUMENT .....</b>	<b>5</b>
<b>A. Probate Court should have held evidentiary hearing .....</b>	<b>5</b>
<b>B. Willful under MCL 700.2801(2)(e).....</b>	<b>6</b>
<b>C. Equitable contribution is justified for ME before she takes martial property.....</b>	<b>7</b>
<b>D. King's administration of the JES Estate did warrant her removal property.....</b>	<b>9</b>

**E. Probate Court Bias.....16**

**CONCLUSION.....16**

## TABLE OF AUTHORITIES

### Cases

<i>Hanik v Wilczynski</i> , 33 Mich App 268, 189 NW2d 815 (1971).....	1,8
<i>In re Estate of Harris</i> 151 Mich App 780 (1986).....	passim
<i>In Re Estate of Peterson</i> , ___Mich App___, 2016 WL 2992474, (May 24, 2016).....	passim
<i>Isabella County Dep't of Soc Servs v Thompson</i> , 210 Mich App 612, 534 NW2d 132 (1995).....	6
<i>Jones v Sanilac County Road Com'n</i> , 128 Mich App 569, 342 NW2d 532 (1983).....	1
<i>Taxpayers Allied for Constitutional Taxation v Wayne County</i> , 203 Mich App 537, 513 NW2d 202 (1994).....	6
<i>Tkachik v. Mandeville</i> , 487 Mich. 38, 790 NW2d 260 (2010).....	5,7,8

### Statutes

MCL 700.2801(2)(e).....	passim
MCL 700.2801(2)(e)(i).....	passim

### Rules

MCR 2.119 (E) (2).....	5,6
MCR 5.203.....	9
MCR 7.305(B)(3).....	4
MCR 7.305(B)(5)(a).....	3

MCR 7.305(B)(5)(b).....

MRE 301.....

## INTRODUCTION OF REPLY

The Appellee, Maggie Erwin ("Maggie"), as she did in the lower courts relies on a complaint filed in Wayne County Circuit Court in 2010 to support her claim she is the surviving spouse of the decedent. The complaint was dismissed before a show cause hearing was held.

### **Exhibit A.**

Appellant Beatrice King ("King") has argued in the lower courts that the pleading was nothing more than hearsay and Maggie's use of it does not fall within one of the exceptions to the hearsay rule. The usage of the 2010 pleading should have been limited to impeachment only. *See Jones v Sanilac County Road Com'n*, 128 Mich App 569, 342 NW2d 532 (1983), *Hanik v Wilczynski*, 33 Mich App 268, 189 NW2d 815 (1971).

A critical question which neither of the lower courts elicited was why was the 2010 lawsuit necessary, L. Fallasha Erwin ("LFE"), King's counsel, gave some background on how he was asked by Jacqueline Nash ("Nash") for assistance because General Motors had terminated Maggie's medical insurance and she had not had coverage for a year to a year and one half. *See Exhibit B, 07/09/14 Tr. 15-16, L17*

The 2010 litigation was instituted because General Motors determined that the decedent, James Erwin, Sr. (JES), and Maggie were not living together and questioned whether they were still married. Maggie did not convince General Motors that she should be reinstated on JES' medical insurance and after a year, LFE got involved. The only purpose of the lawsuit was to get medical insurance for Maggie and that objective was achieved.

During that period of over a year when Maggie did not have medical coverage, JES never paid for her medical coverage or supported her any anyway. After the lawsuit, Maggie and JES

continued to maintain a life separate style and seldom interacted. **See Appellant's Application for Leave to Appeal, Exhibit B.**

Instead of holding the evidentiary hearing as King requested, **Exhibit B 07/09/14 Tr. 34, L3-8**, the probate court relied on argument, unsworn statements and unsigned pleadings. An evidentiary hearing would have allowed all facts to be introduced exposing the fallacy that Maggie and JES maintained an unusual ongoing but separate martial relationship. This creation was made by local counsel for the benefit of the probate court.

## **I. REPLY TO COUNTER STATEMENT OF FACTS AND PROCEEDINGS**

### **A. Background Facts**

King does not dispute the fact that JES and Maggie were married in 1968 after the birth of their second child. In 1976, Maggie established a separate residence and filed a complaint for family support. This action established that her separation was willful and voluntary. **Exhibit C.** Maggie never reestablished a relationship with JES as husband and wife nor did she receive any further financial support after their children reached the age of majority. **Appellant's Application Exhibit B**

King requested documentation that Maggie was the beneficiary of JES' insurance but never received substantiation. **Exhibit D, Reply Brief COA 323387, Exh B, Exh C, Exh D** King could not verify whether Maggie was JES' designated beneficiary and when she was designated or whether she received insurance proceeds because she claimed to be the surviving spouse of JES by providing a marriage license and death certificate. This distinction is important because if Maggie received proceeds because she claimed to be the surviving spouse but under Michigan law she was not, the insurance proceeds may have been payable directly to the Estate.

Maggie's Answer to the Appellant's Application raised issues of whether King attempted collected assets that should be a part of the Estate. Although Maggie claims King made no attempt to collect the loan owed by Stacy Erwin Oakes ("Oakes"), this statement is in correct. King in a letter to Oakes counsel, Robert Miller ("Miller"), requested proof of payment. **Exhibit E, Saginaw Probate Docket, 4/10/15 Response to Petition to Motion to Remove PR, Exhibit B.** Moreover, King had advised the probate court that Oakes had an outstanding loan for which Oakes had claimed to have paid but without any proof. **Exhibit B 07/09/14 Tr. 32, L12-20.**

Furthermore, Maggie's counsel in a letter dated July 3, 2013 identified a mutual fund with an approximate value of \$5,000 which King requested documentation. Maggie's counsel never provided the documentation requested and never addressed the item again. **Exhibit D**

Factually, King reported to the probate court that Nash had identified Estate assets but had not transferred them to King. **Exhibit B 07/09/14 Tr. 34, L9-21.** The probate court's response was to advise King to file more interrogatories but refused to order Nash to transfer the assets. **Appellant's Application Exhibit C.**

## **II. RESPONSE TO REASONS TO DENY APPLICATION FOR LEAVE TO APPEALS.**

### **A. The decision is clearly erroneous and would cause material injustice under MCR 7.305(B)(5)(a) if not reviewed by the Court.**

Maggie suggests the Court should deny the review of this matter because it is a zero asset estate but could be a \$7,000 estate. Maggie claims that these proceeding are used to harass her and her children. The problem is that either the probate court nor Maggie, Nash and Oakes have addressed the affidavits of King or Stanley Roberts who examined items in the safe of JES on October 12, 2012 that disappeared after King was appointed personal representative. **Exhibit E, Saginaw Probate Docket, 6/9/14 Motion for Sanctions, Exhibit K.** LFE personally assisted JES with financial matters and had personal knowledge of one bank account that had a value of over



six figures. This bank account was under Nash's control has not been accounted for yet Maggie wants the Estate closed.

Maggie accuses King of not attempting to collect assets for approximately two years when most of King's time after filing the Claim of Appeal, Docket #323387, has been spent defending the civil action and multiple motions filed by Maggie. It is ironic that the same assets Maggie claims King did not secure for the Estate are the same assets that Maggie's hand-picked successor personal representative, after approximately one year, has not collected and he reports an inventory of \$1. **Exhibit E, Saginaw Probate Docket, 12/14/15 Inventory.** Maggie has failed to put forth any facts that should change the Court' consideration of the Appellant's Application for Leave to Appeal.

**B. A review under MCR 7.305(B)(3) is warranted because the ruling of the lower court is not fact based.**

The reason the instant matter bears a major significance to the state' jurisprudence is because it is not a fact based ruling. The Court of Appeals affirmed the probate court's reliance not on admissible and credible evidence but reliance on argument made by counsel and unsworn statements given by an interested person.

Considering the importance of the issue, an evidentiary hearing was warranted and should have been held by the probate court.

**C. A review under MCR 7.305(B)(5)(b) is warranted to resolve any conflict in Court of Appeals' decisions.**

The Michigan Supreme Court pursuant to MCR 7.305(B)(5)(b) when there is a conflict between Court of Appeals' decisions will grant an application for leave to appeal. Contrary to the argument made by Maggie, there is a conflict between the *Erwin* decision and *In Re Estate of Peterson*, \_\_\_Mich App\_\_\_, 2016 WL 2992474, (May 24, 2016). **Exhibit F.**

Both *Peterson* and the Court of Appeals in this matter involved an analysis of *In Re Estate of Harris* 151 Mich App 790 (1986). In this matter, the Court of Appeals said that physical separation was not enough. Specifically, the court stated it was persuaded by the *Harris* opinion and concluded *that physical as well as emotional separation was necessary*. Exhibit G at pp 4-5

While in *Peterson*, the court agreed with the conclusion reached in *Harris* that the phrase "willfully absent" as used in MCL 700.2801(2)(e)(i) refers to physical absence. The *Peterson* court specifically determined that mental separation is not a requirement of the statute and ruled that "willfully absent" as used in MCL 700.2801(2)(e)(i) means the individual must have done something with the intent to bring about his or her absence from the deceased spouse for a continuous period of over one year. Exhibit F at p 5

Maggie by moving out for a period of thirty-five was a willful act on her part. Under the *Peterson* decision Maggie's move from the marital home was done with the intent to cause her absence therefore she was willfully absent under MCL 700.2801(2)(e)(i).

### III. ARGUMENT

#### A. Probate Court should have held evidentiary hearing

Maggie argues that the Court of Appeals was correct in holding a hearing under MCR 2.119(E)(2). The problem is the probate court only had three affidavits provided by King which the court did not consider as evident by the court's opinion. Appellant's Application Exhibit C. Instead, the probate court relied on an unsigned affidavit of JES. Even though Maggie sought leave to supplement the record on appeal, which the Court of Appeals granted, the signed affidavit by JES was notarized by a different notary. Docket #323387, Answer to Motion to Supplement MCR 2.119(E)(2) requires the probate court to consider affidavits by both parties. Since the

probate court failed to consider affidavits submitted by King, the probate court did not utilize MCR 2.119(E)(2).

**B. Willful under MCL 700.2801(2)(e)**

Under MRE 301 in civil actions, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption. A presumption is a procedural device that regulates the burden of proceeding with the evidence. The presumption is dissipated once the opponent submits substantial evidence. *Isabella County Dep't of Soc Servs v Thompson*, 210 Mich App 612, 534 NW2d 132 (1995). Generally, everyone is presumed to know both the civil and criminal law. *Taxpayers Allied for Constitutional Taxation Wayne County*, 203 Mich App 537, 513 NW2d 202 (1994)

King has argued both in the probate court and the Court of Appeals that MCL 700.2801(2)(e)(i) establishes a presumption that if a surviving spouse is absent for over a year at the time of the decedent's spouse death, the absence is willful. Once the absence is established, King submits Maggie had to either rebut the presumption or meet the presumption that she was not willful absent.

Maggie argues the *Harris* opinion is controlling law for the instant matter as stated in the Court of Appeals opinion. The Court of Appeals ruled King had the burden to establish Maggie was "willfully absent." To proof willful absence, the court found that King had to prove more than physical separation implying, as in *Harris*, King had the burden of proving Maggie intended to give up her martial rights. If King established the separation, Maggie should have introduced evidence to rebut the presumption of willful absence.

Approximately two weeks after the opinion in the instant matter, a different panel of the Court of Appeals issued the published opinion *In re Estate of Peterson, supra*. The *Peterson*

court found that because of the change in the statute, the element of the *Harris* decision of intent to give up marital rights was no longer applicable under MCL 700.2801(2)(e)(i) **Exhibit F at p 5**

The *Peterson* court was faced with a case where the decedent had intently separated himself from the surviving spouse. The court had to decide whether the surviving spouse was "willfully absent as used in MCL 700.2801(2)(e)(i). To decide the issue, the court had to determine what the Legislature meant with the use of "willful absence." The court ruled:

" Specifically, in order for an individual to be "willfully absent" within the meaning of MCL 700.2802(2)(e)(i), *the individual must have done something with the intent to bring about his or her absence from the deceased spouse* (Emphasis Added)." **Exhibit at p 5**

The court also determined that the absence must be continuous for one year or more at the time of the decedent' death.

In this Application, it is undisputed that Maggie has been separated from JES for a period of approximately thirty-five years before the death of JES. The *Erwin* court stated that King could not rely on the separation of Maggie as a willful act alone. However, *Peterson* states if the surviving spouse did something with the intent to bring about the absence (like moving from the martial home and establishing a separate residence) than that act would fall within the definition of willful absence and exclude the spouse as a surviving spouse.

### **C. Equitable contribution is justified for ME before she takes martial property**

Maggie's argument that the holding of *Tkachik v. Mandeville*, 487 Mich. 38 (2010) is not applicable to this matter ignores the historical analysis the Supreme Court used in arriving at its decision. The key element the Supreme Court relied on from its historical analysis was the physical separation of the spouses for a lengthy amount of time.

The essential fact of this case is Maggie has lived apart from JES for over thirty years prior to his death. She never came back to the martial home to maintain or reestablish the marriage that begun in 1968. Maggie has lived away from JES for over thirty years and only lived with him as his wife for only 8 years. Maggie argues that she maintained the marriage when the facts show she lived away from her husband for a period of time four times greater than the time she lived with him. Maggie through her counsel has advanced several baseless arguments and theories. Such as King has not offered any proof Maggie willingly established a separate residence although from 1976 until 2012 she never attempted to move back to the martial home or exhibit the behavior that she and JES was husband and wife. Maggie should have offered such evidence to rebut the presumption established by King.

Maggie would ask this Court to grant her sole right to the martial property without contribution to the Estate for the property she has not inhabited since 1976. Without a contribution to the Estate, Maggie would be unjustly enriched. She was not there to serve as JES' wife, to give him moral support, to be a partner in the care of the property and to honor vows of their marriage. To the contrary, she established a separate life that was not as the wife of JES.

The *Tkachik* case and the MCL 700.2801(e)(2) are both based on the separation of spouses when one of the spouses dies without a will. It is unusual for a spouse to maintain a separate residence for over three decades then appear at a spouse's death, and say it was a normal marriage.

The real issue in this case is not whether JES and Maggie were married but whether Maggie was willing absent from JES as a spouse. If the Court allows the decision of this matter to stand, so long as the decedent is married at the time of his/her death then a spouse will always be a surviving spouse nullifying MCL 700.2801(e)(2).

As the court found in *Peterson*, the intent to move and maintain a separate residence for over one year is strong if not conclusive evidence that the absence from the decedent was willful

**D. King's administration of the JES Estate did warrant her removal**

It is ironic that Maggie cites MCR 5.203 in arguing that King did not properly administer the Estate. The court rule outlines the procedure the probate court must follow "if it appears to the court that the fiduciary is not properly administering the estate." King raised the court rule in its Appellant Brief, Docket #329264, p.24, but the Court of Appeals declined to consider it.

The Court of Appeals affirmed the probate court by finding it was in the best interest of the Estate that King be removed as personal representative. In considering what is in the best interest of the Estate, the best interest of most of the heirs should have been considered not the best interest of one heir. Oakes, as the attorney in fact for Maggie, filed one petition to remove King and individually filed another petition to remove King.

The removal of King is self serving for Oakes since she seeks to close the Estate and she has failed to prove she repaid the \$5,000 loan outstanding and failed to provide proof of the \$5,000 mutual fund. **Exhibit D**. Moreover, the hand-picked successor personal representative has failed to acquire proof of Oakes repayment of the loan or attempted to discover what happen to the \$5,000 mutual fund.

Maggie wants the Estate closed because of a number of questionable actions taken before the Estate was opened. Maggie filed a complaint, shortly after a Claim of Appeal was filed, seeking reimbursement for the funeral cost of the decedent. Keep in mind that Maggie did not have the mental capacity to handle the funeral arrangement and Oakes had a personal relationship with operators of the funeral home.

King filed a Motion for Stay with the Court of Appeals, Docket #329264 showing the inconsistencies of the claim for payment of the funeral. King's Exhibit P was the complaint filed by Maggie, with the claim signed under oath, that she paid approximately \$12,000 in cash for the funeral. Yet four to five months later, the claim was changed to being paid with checks but not during the same time period. Exhibits Q and R attached as **Exhibit H**. Before a hearing on the complaint, the probate court decided Maggie had paid the funeral expense. **05/18/15 Tr. 21**

### **E. Probate Court Bias**

The probate court alleges that it treated all parties equally. The probate court attempts to point out that if a party or attorney did not appear timely, the court proceeded with the hearing. However, when Maggie's attorney failed to appear on June 10, 2015, the court telephoned her so she could participate. When Oakes' attorney failed to appear on May 6, 2014, the probate court noted his absence, **05/18/15 Tr. 4**, but implies Maggie's counsel covered for him. **05/18/15 Tr. 17**

Contrast the treatment of King and her counsel, King was removed as personal representative and both sanctioned for over 12,000 in attorney fees.

### **CONCLUSION**

For the supplemental reasons set forth herein, King request that the Court accept its Application for leave to Appeal. Respectfully submitted,

COMMERCIAL LAW CORPORATION, P.C.

By: /s/L. Fallasha Erwin  
 L. Fallasha Erwin (P27018)  
 Attorney for Appellant, Beatrice King,  
 Personal Representative  
 220 Bagley, Suite 1010  
 Detroit, MI 48226  
[ferwin@sbcglobal.net](mailto:ferwin@sbcglobal.net)  
 (313) 964-2502 (phone)  
 (313) 964-2929 (fax)

Date: August 26, 2016